Internal Revenue Service
memorandum

date: January 5, 1996

to: Assistant Commissioner (Collection) CP:CO

from: Associate Chief Counsel (Enforcement Litigation) CC:EL
Associate Chief Counsel (Finance and Management) CC:F&M

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subject: Legal Issues Associated with Contracting Out Collection Activities Under Treasury Postal and General Government Appropriations Act of 1996 - P.L. 104-52, 109 Stat. 468

Attached to this memorandum is a document which reflects the position of the Office of Chief Counsel regarding the legal issues associated with P.L. 104-52, 109 Stat. 468. Included among its provisions is a requirement that $13 million be used to initiate a program to utilize private counsel law firms and debt collection agencies in collection activities of the Service.

We are available to discuss this document with you and to work with your office in the future in carrying out this program.

ELIOT D. FIELDING

RICHARD J. MIHELCIC

Attachment:
As stated

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CONTRACTING OUT COLLECTIONS

INTRODUCTION

This responds to your December 8, 1995, memorandum seeking "Guidance for Implementation of H.R. 2020, Amendment 22." Your memorandum raises numerous questions related to the requirement " ... that $13,000,000 shall be used to initiate a program to utilize private counsel law firms and debt collection agencies in collection activities of the Internal Revenue Service in compliance with section 104 of this Act." Treasury, Postal, and General Government Appropriations Act 1996, P.L. 104-52, 109 Stat. 468, ["TAA96"]. In December 1992, the Office of Chief Counsel issued guidance in this area in a paper titled "Legal Issues Raised by a Proposal to Contract Out Tax Collection Related Activities", ["Previous Guidance"].

This memorandum is consistent with our Previous Guidance, with the exception that the direction in TAA96 that $13 million be used for this specific program eliminates the need for an A-76 study. OMB Circular A-76 is also inapplicable, although the general principles prohibiting contracting out of inherently governmental functions that are reflected in that Circular remain applicable to contracts issued under TAA96. Therefore, you do not need to request a waiver from any A-76 requirement.

I. Taxpayer Rights

Before we address the specific issues in your memorandum, it may be helpful to note that any full analysis of the issues raised by contracting out tax collection activities must take statutes other than TAA96 into account. Thus, TAA96 did not override a number of statutes that apply to government operations in general and tax collection in particular, nor do the terms of TAA96 literally incorporate certain specific measures that seem to have been intended by the legislative sponsors. In some instances, we have also been required to reconcile statutory directives that were not entirely consistent with each other. We identify these statutes throughout this memorandum as the Internal Revenue Code (26 U.S.C.) ["I.R.C." or the "Code"], the Fair Debt Collection Practices Act (15 U.S.C. § 1692) ["FDCPA"], and the Taxpayer Bill of Rights ["TBOR"], which TAA96 and its legislative history specifically address.

Several themes which run through this document are worth mentioning at the outset. First, the Commissioner may not, by contract or otherwise, delegate power or authority which she herself does not possess. Therefore, to the extent that Service personnel engaged in tax collection activity are legally required to act (or refrain from acting), those same mandates (and restrictions) would apply to contractor. Any contract under which a private tax collector will operate should make clear that the contractor is obliged to abide by all provisions of law applicable to the Service. Thus, for example, the Commissioner would

face exposure to criticism and potential legal liability if contractor personnel were explicitly or implicitly permitted to engage in unauthorized collection activity within the meaning of section 7433. A second theme is that the sum of the parts must equal the whole; thus, while the Commissioner can contract with private debt collection concerns to perform a part or the whole of certain tax collection functions, she must ensure that all activities she is obliged to perform are actually performed. Thus, as the legislative history of TAA96 indicates, taxpayers are to be afforded the same rights that currently exist under law.[1]

1. How does the FDCPA apply to collection activities of private contractors under TAA96?

Under TAA96, when collecting taxes the private contractors will be subject to the two provisions of the FDCPA which have applied to the collection of taxes by the Service since 1979: 1) 15 U.S.C. § 1692c(a) prohibiting contacting debtors at times and in places "known to be inconvenient" to the debtor, requiring collectors to deal with the debtor's attorney when the debtor is represented, and prohibiting certain contacts at the debtor's place of employment; and 2) 15 U.S.C. § 1692d, prohibiting conduct "the natural consequence of which is to harass, oppress and or abuse." They will not be subject to other sections of the FDCPA.

The FDCPA regulates the conduct of "debt collectors" when attempting to collect consumer debts. Tax debts do not fall within the scope of consumer debts to which the FDCPA applies. Moreover, the FDCPA excludes from its definition of "debt collector,"

> any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties. 15 U.S.C. § 1692a(6)(C).

However, a provision requiring compliance with two provisions of the FDCPA (section 805, dealing with communications in connection with debt collection, codified as 15 U.S.C. § 1692c(a) and section 806 dealing with harassment or abuse, codified as 15 U.S.C. § 1692d) has been part of the annual Treasury appropriations bills since 1979. The provision was inserted in the Appropriations Act for the fiscal year ended September 30, 1980, as the result of a floor amendment by Congressman Symms. He noted that the previous Congress had passed the FDCPA requiring private sector collectors to follow a certain code of conduct in collecting debts, and wanted to extend some of its provisions to the Internal Revenue Service, stating,

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[1] Although restrictions on contractor tax collection activities and the rights in the process afforded to taxpayers under TAA96 remain unchanged, the remedies available to taxpayers for violations of those rights may be more limited or different when violations by private contractors occur. See, Section III: Liability Issues.

> Basically, this amendment would prohibit IRS agents from harassing or intimidating any person in connection with the collection of any debt or the threat or attempt to do so. Presently, taxpayers are oftentimes harassed at home or at work where they have been threatened or where armed agents have come to their homes at late evening hours in an effort to collect revenue that in many instances is not due. 125 Cong. Rec. H18442 (1979).

Each year since that time, the annual Treasury appropriations bill has contained the provision with regard to the FDCPA with no additional comment. In TAA96, the language binding the Service to the two provisions was modified to make private contractors engaging in Internal Revenue collection activities also subject to the two provisions.

While private collection agencies will, therefore, be subject to certain FDCPA constraints when collecting tax debts (and, as indicated above, should also be subject to other restraints that mirror those applicable to Service employees), it should be noted those restrictions likely will not completely correspond to the FDCPA regime under which the private agencies are accustomed to working. For example, private collectors of consumer debts may not, except under defined circumstances, contact third parties with respect to those debts. One such defined circumstance under which such contact may be made is if "reasonably necessary to effectuate a post-judgmental judicial remedy." 15 U.S.C. § 1692c(a). Neither the Code nor TAA96 so restrict such third party contacts.

2. Does TBOR[2] apply to the activities of private contractors funded under TAA96?

The restrictions which apply to federal tax collection under the law, including TBOR apply to the activities of private contractors under TAA96. Although the statutory language of TAA96 does not specifically mention any other rights to be afforded taxpayers, the report accompanying the original introduction of the bill in the House stated that:

> The Committee is certainly not interested in violating the rights of taxpayers and has limited the funds to contracts which provide protections found in the Taxpayer Bill of Rights. Additionally, the Committee believes that the contracts should provide for "progress" payments to private sector companies where payment on the contract will depend on adherence to the Taxpayer Bill of Rights, as well as revenue actually collected. In this way, the contractor only receives payment if revenue is collected. H.R. Rep. 104-83, 104th Cong., 1st Sess. 27 (1995).

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[2] TBOR, which was passed as Subtitle J of Title VI of Technical and Miscellaneous Revenue Act of 1988 (TAMRA), P.L. No. 100-647, is not a specific compilation of rights of taxpayers. Rather it is twenty-two sections of TAMRA (sections 6226 through 6247) that add or modify various sections in the Code, as well as several provisions that were not incorporated into the Code in Title 26.

Admittedly, there is tension between the statement that payments to private sector companies are to be made "only if revenue is collected" and the provision of TBOR that prohibits the use of tax enforcement records to evaluate employees and immediate supervisors in tax collection activities. We believe that while Congress did not intend in any way to diminish the rights of taxpayers in connection with tax collection by passing TAA96,[3] the reference to payment being contingent on whether "revenue is collected" reflects a relaxation of the TBOR bar on evaluating performance, inter alia, on this basis of collections. The exact degree of this relaxation, however, is difficult to define with precision in light of other indications that Congress intended to protect taxpayers' rights as reflected in TBOR. See, Section VI: Payment Issues.

II. Disclosure Issues

I.R.C. § 6103(n) permits the Service to make disclosures to contractors from whom it procures property and services. It provides:

> [p]ursuant to regulations prescribed by the Secretary, returns and return information may be disclosed to any person ... to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, and the providing of other services, for the purposes of tax administration.

Any person receiving tax information under section 6103(n) is subject to the Code's civil and criminal penalties for unauthorized disclosures. I.R.C. §§ 6103(a)(3), 7431(a)(2), and 7213(a)(1).

The regulations promulgated under section 6103(n) elaborate on the statutory language and provide additional requirements that are to be met in each contract that requires the disclosure of tax information. Disclosure of returns or return information in connection with contractual procurement of property or services described in subsection (n) will be treated as necessary only if the procurement or performance of the services cannot otherwise be reasonably, properly or economically carried out without the disclosure. Treas. Reg. § 301.6103(n)-1(b). Thus, if disclosure of only part or parts of a return or return information would not seriously impair the ability of the contractor to perform the activity, only those parts should be disclosed. Id.

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[3] In this regard, while we note the statement in Congressman William Archer's July 10, 1995, letter to House Committee on Appropriations Chairman, Bob Livingston that "...it be made clear to the IRS and the Department of Treasury that contractors given collection tasks must be bound by all restrictions placed on the IRS pertaining to the protection of taxpayer rights."

The contractor may disclose information to its officers and employees only for a purpose specified in subsection (n). Treas. Reg. § 301.6103(n)-1(a). Disclosure to anyone other than an officer or employee of the contractor whose duties require such disclosure requires written approval by the Service. Id. In addition, each of the contractor's employees to whom return information will be disclosed must be notified in writing of the purposes for which return information can be used and of the potential civil and criminal penalties for unauthorized disclosures. Treas. Reg. § 301.6103(n)-1(c). Finally, the terms of any contract must provide that the contractor will comply with any restrictions and conditions prescribed by the Service for safeguarding the confidentiality of the information and preventing unauthorized disclosures. Treas. Reg. § 301.6103(n)-1(d).

1. Can the Service disclose tax information to a contractor in connection with a contract for the performance of collection activities?

Yes. Assuming the regulations are complied with, the plain language of the statute would permit the disclosure of tax information necessary to the providing of other services for purposes of tax administration. Clearly the collection of tax debts falls within the definition of "tax administration." See I.R.C. § 6103(b)(4). The only question that might be raised is whether private tax collection services fell within the scope of the term "providing of other services."

The language "the providing of other services", was added by section 11313 of the Omnibus Budget Reconciliation Act of 1990 (OBRA 1990), P. L. 101-508, 104 Stat. 1388-455 (Nov. 5, 1990), to clarify that persons who provided services to the IRS for tax administration purposes and to whom the IRS discloses tax information were covered by the penalties for unauthorized disclosure. H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1076-1077 (1990). Even before OBRA 1990, the Service had taken the position that "processing" as used in section 6103(n) and the implementing regulations was broad enough to encompass many activities now characterized as "services." The amendment appears to confirm this interpretation and makes clear that section 6103(n) is not limited only to contracts for mechanical and technological services.

On December 15, 1995, a Notice of Proposed Rulemaking was published in the Federal Register that would amend Treas. Reg. § 301.6103(n)-1(a) to reflect the change made by OBRA 1990. 60 Fed. Reg. 64402-3 (December 15, 1995). Assuming this proposed change becomes final, it will eliminate one potential source for challenge.

[redacted]

2. What can the contractor do with the information?

The contractor can only disclose the information for the tax administration purpose described in the contract. Any disclosure by the contractor for a purpose other than that specified would subject the contractor to the civil damages and criminal penalty provisions of

the Code. The United States is not liable for unauthorized disclosures made by the contractor (or the contractor's employees) under the civil damages provisions of section 7431. I.R.C. § 7431(a)(2).

The next question, logically, is whether the contractor can disclose tax information for a purpose specified in the contract to a person other than the contractor's officers and employees.[4]

The regulation permits the contractor to redisclose tax information with the Service's written approval. Treas. Reg. § 301.6103(n)-1(a). The regulation does not specify which Service official must provide the written approval. However, the delegation to disclose tax information in connection with contractual procurement has been construed also to delegate to the same Service officials the authority to approve redisclosures by the contractor under the regulation. Approval by the Service could be provided on a case by case basis, or through specific criteria covering precisely what information may be disclosed by the contractor, to whom, and under what circumstances (e.g., written or telephonic correspondence with taxpayers). Further, the contractor would also be governed by section 6103 in the disclosures it would be permitted to make (e.g., it could disclose tax information to the taxpayer under the conditions specified in I.R.C. § 6103(e)).

Given the serious confidentiality concerns surrounding privatization, it must be assumed that the types of activities to be performed by contractors, and any redisclosures accompanying such activities, will be scrutinized closely by the Congress and the general public. For example, any authorization for the contractor to make third party investigative-type disclosures (I.R.C. § 6103(k)(6)), if given at all, would have to be carefully limited.

3. Can the contractor disclose tax information to a subcontractor or independent contractor?

Yes, although such disclosures raise a number of serious questions. By definition, a contractor's subcontractor, or independent contractor,[5] is not the contractor's employee. As such, under the literal terms of Treas. Reg. § 301.6103(n)-1(a), tax information could be disclosed to the subcontractor to perform an activity under the contract, but it would require the Service's written approval. [redacted] DP

[4] Although the regulations' redisclosure rule raises the issue of subcontractors, that topic will be dealt with separately below.

[5] For ease of reference in connection with the discussion of disclosure of tax information, subcontractors and independent contractors will be referred to collectively as subcontractors. For other purposes, the terms should not be considered synonymous.

[redacted]

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Other issues are raised and discussed below.

a. Is a subcontractor receiving tax information subject to the same safeguards as the contractor?

This is not clear. Regulations require that as part of the section 6103(n) contract, the contractor agree to any conditions prescribed by the Service to protect the confidentiality of returns and return information and prevent unauthorized disclosures. Treas. Reg. § 301.6103(n)-1(d). In practice, this has meant that contractors must adopt the same safeguards for tax information as are prescribed for other Federal and State agencies that receive tax information under section 6103. For example, the contractor must submit its facilities to potential inspection by Service personnel. Failure to satisfy such conditions can result in the suspension or termination of duties under the contract or the suspension of further disclosures. Id.

Absent specific safeguard provisions applicable to subcontractors in each contract and subcontract, the Service's ability to require the subcontractor to implement a system of safeguards and to permit inspection by Service personnel would not be clear.

Finally, we note in order for disclosure safeguards to have any meaning, sufficient resources must be allocated to perform safeguard reviews by Service personnel. The use of large numbers of contractors and subcontractors will require that more resources be devoted to safeguard review functions.

b. What is the status, under I.R.C. § 6103, of information collected by a subcontractor?

This is also not clear. Information collected by the Service's contractor in the performance of a contract for tax administration services is return information protected from redisclosure by section 6103. Wiemerslage v. Commissioner, 838 F.2d 899 (7th Cir. 1988). The status of information collected by a subcontractor is much less certain. Given this ambiguity, at a minimum, contractual provisions should limit the use of any information collected by a subcontractor to the performance of the tax administration subcontract, and prohibit its use in any of the subcontractor's other activities.

III. Liability Issues

1. What is the liability of a contractor and the United States for disclosure of information for other than tax administration purposes or for other disclosure violations?

As previously stated, a contractor can only disclose the information for the tax administration purpose described in the contract. Any disclosure by the contractor for a purpose other than that specified would subject the contractor to civil and criminal sanctions under the I.R.C. As to civil damages, section 7431 limits liability of the United States to actions of its officers or employees. Contractors under the TAA96 are not officers or employees of the United States. Accordingly, the United States would not be liable for unauthorized disclosures made by the contractor (or the contractor's employees) under the civil damages provisions of section 7431. I.R.C. § 7431(a)(2).[6]

2. Is a subcontractor receiving tax information subject to the Code's civil and criminal penalties for unauthorized disclosures?

This is unclear. The prohibition on disclosure of returns and return information in section 6103(a) includes any "person (or officer or employee thereof) who has or had access to returns or return information under ... subsection (n)". I.R.C. § 6103(a)(3). The criminal penalties of section 7213 apply to, among others, "any person described in section 6103(n) (or an officer or employee of any such person) ... ." Section 7431's civil damages remedy applies to any person "who discloses any return or return information in violation of any provision of section 6103."

Arguably, because the subcontractor is receiving the information pursuant to a regulation promulgated under section 6103(n), it could be considered a person described in that section, or a person who has had access to return information under that section. However, because, technically, the subcontractor is providing services to the contractor rather than the Service, it is unclear whether the subcontractor would be subject to the civil and criminal penalties for unauthorized disclosures. In addition, given the language in the regulations that limits notification of the penalty provisions for unauthorized disclosures to the contractor's employees, it is unclear whether notification would have to be given to a subcontractor, or by the subcontractor to the subcontractor's employees.

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[6] It is also possible that contractors would seek indemnification under their contracts with the Service even though the Service has no direct liability. Any indemnity clause in the contract must have a cap, because the Antideficiency Act forbids federal agencies from making or authorizing expenditures in excess of the amount available in an appropriation or fund for the expenditure or obligation. 31 U.S.C. § 1341.

3. What is the liability of private contractors and the United States for unlawful collection actions by the contractor?

Certain sections of the Internal Revenue Code, such as section 7432 (relating to civil damages for failure to release a lien) and section 7433 (relating to civil damages for unauthorized collection actions) entitle taxpayers to sue and collect damages against the United States for unauthorized actions of its officers or employees. Since private contractors are not officers or employees of the United States, it is not likely that a court would entertain a suit for damages against the United States under such sections of the Code based on ultra vires actions of private contractors. See, Footnote 1, supra.

A claim or suit for damages against the United States under the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680) ["FTCA"] should fail because, as previously discussed, contractors are not federal employees and because the FTCA does not provide for government liability for damage claims arising "in respect of the assessment or collection of any tax." 28 U.S.C. § 2680(c). However, the taxpayers may have a tort action against the private contractors.

4. What legal recourse do we have against a vendor or their employees for any wrongdoing in performance of our contract?

Contractor-wrongdoing may lead to terminating the contract for default, thus making the terminated contractor liable for actual or liquidated damages to the Government and for the costs of reprocuring a replacement contract, as well. In addition, the Government may initiate administrative suspension or debarment proceedings against the contractor or its employees to preclude either from taking any Government contracts for a specified period of time. Government contracts also contain standard clauses warning contractors, subcontractors, and their employees of the civil and criminal sanctions for violating various statutes.

IV. Choice of Work Issue

1. How does the concept of "Inherently Governmental" functions apply to the program initiated under TAA96?

Counsel's Previous Guidance about the concept of inherently governmental functions is not changed as a result of TAA96. The principle that certain functions of the government are "inherently governmental" is still applicable, and the taxing power is essential to the governing process. Therefore, we consider tax collection, as a whole, to be an "inherently governmental" function. As we previously advised, certain isolatable parts or stages of the tax collection process may be identified as activities which may be contracted out without impinging on the inherently governmental nature of the process as a whole. Recognition of this approach is implicitly reflected in the legislative history of P.L. 104-52. TAA96

itself does not prescribe a specific method for initiating the contemplated program, but the legislative history of TAA96 suggests that Congressional intent was consistent with the general guidelines previously given by Counsel.

If the program adheres generally to the types of activities described in the legislative history of TAA96 (discussed more fully below) and if the Service maintains necessary controls, the question of whether any phase of the program involves an attempt to contract for an inherently governmental function should not create difficulties.

The only Congressional report helping to define the scope of the initiative is H.R. Rep. No. 104-183, 104th Cong., 1st Sess., at 27 (July 12, 1995). According to the report, the drafters contemplated that the scope of the initiative would be limited by the following:

> [T]here are valid legal issues which must be taken into account before this initiative can be implemented. For example, according to OMB, the actual collection of taxes is considered an inherently governmental function requiring performance by government employees.

Id. Accordingly, Congress clearly contemplated an initiative in which contractors performed no actual collection of taxes.

The remaining legislative history consists of debate among senators and representatives on the floor of the Senate and House. Senator Shelby chairs the appropriations subcommittee responsible for the bill and was one of the managers of the bill offered after the conference had completed its work. The following are references to the record in which he further described his concept of the boundaries of the initiative in his debate at 141 Cong. Rec. S17075 (daily ed. Nov. 15, 1995), (remarks of Senator Shelby):

> This proposal allows the IRS to create the plan. They can address all of the concerns that have been raised, not only by [Senator Pryor] but by others, including this Senator.
>
> . . . .
>
> What type of taxpayer records will [contractors] have access to? . . . . The only information that contractors would receive would be the debtor's name, the address, the phone number, the Social Security number, employer, and amount owed, just as they would with any nontax debt in America.
>
> Mr. President, the debtor's tax return would not--and I repeat, would not--be disclosed to the contractor.
>
> . . . .

On which cases will the collector's [sic] work? Currently not collectible accounts, that is what they are called, Mr. President, as classified by the IRS since these accounts are now lying dormant at the IRS, $70 billion of them.

One approach would be to send cases to private contractors that are otherwise noncollectible, primarily where there is an inability to locate the taxpayer and, in such cases, a contractor should be able to invest more resources to locate them than the IRS can spend.

Another approach would be to take cases that are deferred, meaning that there is a small enough balance due that the moneys are left uncollected until some other credit shows up in the system, such as a refund, that is then offset against the deferred amount, and replace these with private collectors.

What type of collection services will they provide? The contractors will be responsible for generating letters to be mailed in most cases by the IRS and making phone calls to debtors. The letters and calls would be designed to remind debtors of their outstanding tax debt and to seek assurances from the debtor that the debt will be repaid. The contractors would not, Mr. President, be authorized to receive funds, compromise debts, sue debtors, seize property, or levy against assets.

At this time, it would seem to make sense to me to test a program where private contractors locate and call taxpayers by telephone and inform them of how much they owe, how high interest and/or penalties are accumulating, their options, and the actions the IRS can take if they do not pay.

However, the contractor would not make the final decision and should not make the final decision whether or not to enter into an installment agreement or to take any other collection action.

The bottom line is that this is a pilot program. IRS has full control. They should have full control. The points I have tried to respond to are examples. IRS will be making the decisions. I believe that any ideas should be considered. I believe this is a good proposal that we have come forth with.

Senator Pryor led the opposition to the $13 million private tax collection initiative, speaking against it at Cong. Rec. S17068, 17073-74, and 17076 (Nov. 15, 1995). In his debate, he placed in the record an August 4, 1995, letter from the Commissioner expressing her concern regarding the $13 million private tax collection initiative. She stated:

> I have grave reservations about starting down the path of using private contractors to contact taxpayers regarding their delinquent tax debts without Congress having a thorough understanding of the costs, the benefits and risks of embarking on such a course.

Id. at S17073.

At the end of her letter, the Commissioner requested "a more extensive dialogue . . . on the matter of contracting out collection activity before the IRS proceeds to implement such a provision." Id. at S17014. The Pryor/Shelby debate is the only such dialogue on the record.

2. What are the types of collection inventories or collection scenarios upon which private contractors can work under TAA96?

Without a detailed description of the specific work plan regarding a particular set of cases or account, we cannot issue a legal opinion that any proposal clearly is within the scope of the law. Therefore, we cannot at this point provide an opinion that any particular inventory, type of account or scenario described in your memorandum or other documents provided to us is without legal defect. We are available to issue such a legal opinion regarding any specific program chosen; such an opinion will be based on the guidance provided in this memorandum and the legislative history to TAA96 discussed herein.

However, certain proposals presented to us are clearly beyond the scope to the law. In order to assist you in narrowing the scope of programs under consideration for implementation under H.R. 2020, Amendment 22, we will discuss these particular proposals.

a. [redacted]

[redacted]

[redacted]

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V. Appropriations Issues

1. What happens if the Service is unable to put a contract in place during fiscal year 1996?

Since TAA96 is part of the annual fiscal year appropriation, the Service may only obligate the $13 million during fiscal year 1996. Any portion of the $13 million not obligated by September 30, 1996, expires and is unavailable for obligation. See, e.g., GAO, Principles of Federal Appropriations Law, 2d ed., Vol. I at 5-4. Thus, contracts intended to obligate any part of the $13 million appropriated for the private collection program must be awarded by September 30, 1996.[7]

2. What happens if we put a contract into place but not actual work--are we in violation of legislation?

No. The nature of the work contemplated by the initiative is severable--that is, it can be divided in terms of time or task. A contract to perform such work is a severable service contract. The rule implementing a new funding authority for severable service contracts became effective on August 21, 1995. The authority arose from section 1073 of P.L. No.

[7] In the event a protest is filed in connection with the solicitation for, proposed award of, or award of the contracts, funds available for the contract shall remain available for obligation for 90 working days after the final ruling is made on the protest. 31 U.S.C. § 1558(a).

103-355 (Oct. 13, 1994), the Federal Acquisition Streamlining Act of 1994 (FASA). Most provisions of FASA became effective on October 1, 1995, or on any earlier date specified in final rules implementing the provisions. Id. at § 10001(a)(3). .

The rule regarding the new funding authority for severable service contracts is found at FAR 32.703-3(b), which states that a civilian federal agency other than NASA may:

> enter into a basic contract, options, or orders under that contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the basic contract, options, or orders under the contract does not exceed one year each. Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority . . . .

Accordingly, even if contracts for collection services were not awarded until so late in FY 96 that no actual work had actually begun, portions--or all--of the $13 million appropriated for FY 96 could be obligated to fund the first calendar year of the contracts, despite the fact that the calendar year extends well into FY 97.

3. Can the Service spend portions of the $13 million for internal expenses?

A basic principle of appropriation law is that funds appropriated for a particular object may also be used to incur expenses which are "necessary or proper or incident to the proper execution of the object" except where another appropriation makes specific provision for such expenditures. GAO, Principles of Federal Appropriation Law, supra at 4-15. Hence, the cost of administering the private collection program, including internal expenses, may be paid out of the $13 million, to the extent that another appropriation does not specifically provide for the expenditures.

Administration costs may include, but are not limited to, the following:

(1) Procurement's costs of contract formation, award, and administration of the contract(s);

(2) Chief Counsel and IRS costs of defending award and other protests (if protesters are successful, IRS must pay protesters' attorney and other protest costs as well);

(3) Costs of contracting officer's technical representatives (COTRs)--these IRS officials normally have local contact with the contractors' employees and can evaluate the contractor's performance;

(4) Training provided by IRS employees;

(5) Disclosure safeguard reviews;

(6) Contractor-provided training of collection contractor employees; and

(7) Other IRS costs associated with establishing the pilot

4. Can the Service spend more than $13 million on the program?

TAA96 provides, in pertinent part, "that $13,000,000 shall be used to initiate a program to utilize private counsel law firms and debt collection agencies in the collection activities of the Internal Revenue Service in compliance with section 104 of this Act." Designation--or "earmarking"--of part of a general lump sum appropriation for a particular object may be used to set a maximum amount an agency may use for the stated purpose, a minimum, or both. GAO, Principles of Federal Appropriation Law, 2d ed., vol. II, at 6-4. Generally, language earmarking a specific amount for a particular object caps the amount of agency funds that may be spent on the object. Id. See also, 36 Comp. Gen. 526 (1957). Because our research has not revealed any Comptroller General decisions interpreting the phrase "shall be used to" and because neither the term, on its face, nor TAA96's legislative history, indicate a Congressional intent to authorize expenditure of more than $13 million on this program, we recommend that the Service cap program expenditures at $13 million.

5. What does "initiate" mean in the Context of H.R. 2020? If we spend $13 million internally does this count as initiating?

The legislative history of the TAA96 indicates that Congress intended the $13 million to be used for a "pilot program" concerning the use of private debt collectors. See, e.g., 141 Cong. Rec. S17075 (daily ed. Nov. 15, 1995) (remark of Sen. Shelby). Neither TAA96 nor its legislative history specifically defines the word "initiate." However, the dictionary defines "initiate" as "to begin, set going, or originate." Random House College Dictionary (rev. ed. 1980). Under this definition, the Service could use the $13 million for the start-up costs of the program, as well as for actual payments to private collectors. However, a reasonable reading of the legislative history suggests that Congress intended that a significant portion of the $13 million to be expended on private contractors attempting to collect taxes.

VI. Payment Issues

1. Can the private counsel law firms and debt collection agencies be paid from amounts collected by them?

As indicated in Previous Guidance, private contractors cannot be paid directly from funds collected. Tax indebtedness is expressly excluded from the Debt Collection Act. See, 31 U.S.C. § 3718(f). "This section does not apply to the collection of debts under the

Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.)." See also, 31 U.S.C. § 3701, excepting Internal Revenue claims. The appropriations act, Pub. L. 104-52, did not remove this exception from the Debt Collection Act.

Moreover, taken outside the context of the Debt Collection Act, payments from recoveries by contractual tax collection services would violate the so-called "Miscellaneous Receipts Act," 31 U.S.C. § 3302(b) (1982). Under 31 U.S.C. § 3302(b), unless otherwise provided by law, each agency is generally required to deposit into the general fund of the Treasury all amounts received by its officers and agents, "without deduction for any charge or claim." See, Acceptance of Payment by Commercial Credit Card, B-177617, 67 Comp. Gen. 48 (1987).

Section 31 U.S.C. § 3718(d) of the Debt Collection Act creates an express exception to the Miscellaneous Receipts Act in order to authorize agencies to pay debt collection contractor fees by means of deductions from collection proceeds. See, Department of the Treasury – Collection of Unclaimed Properties, B-248623 (January 22, 1993); GSA – Transportation Audit Contracts, B-198137, 64 Comp. Gen. 366 (1985). Because no such exception is stated in Pub. L. 104-52, to pay a contractor directly from the proceeds recovered from tax debt collections violates the Receipts Act.

2. Can the private counsel law firms and debt collection agencies be paid a fee equal to a percentage of the amount of taxes collected as a result of their efforts?

The answer to this question is not entirely clear. The statutory language of TAA96 is silent on this issue. Furthermore, the legislative history of TAA96 may be read as internally inconsistent regarding the degree to which the Service can base overall compensation paid to contractors on revenue collected. On balance, however, it is our view that, subject to conditions and limitations described below, the Service may legally enter into a contract under which a meaningful portion of the total compensation is dependent on the amount of revenue actually collected as a result of contractors' efforts.

This conclusion is based primarily on the following portion of the legislative history of TAA96:

> ...the Committee believes that the contracts should provide for "progress" payments to private sector companies where payment on the contract will depend on adherence to the Taxpayer Bill of Rights, as well as revenue actually collected. In this way, the contractor only receives payment if revenue is collected. [emphasis supplied] H.R. Rep. 104-83, 104th Cong., 1st Sess. 27 (1995).

While this statement might appear clear on its face, there is an internal inconsistency as a result of the reference to compliance with TBOR. A non-codified provision of TBOR states that:

> (a) In General-The Internal Revenue Service shall not use records of tax enforcement results-
>
> (1) to evaluate employees directly involved in collection activities and their immediate supervisors...
>
> Section 6231, Basis for Evaluation of Revenue Service Employees, Subtitle J of Title VI of TAMRA, P.L. No. 100-647.

During the floor debate on TAA96, Senator Pyror; (speaking in opposition to the provision which ultimately passed) also noted:

> [M]ost bill collectors are paid on a contingency basis-that is, they are compensated on some percentage of what they collect.
>
> If this is to be the case-and it is certainly a possibility under the bill-this is a blatant violation of the Taxpayer Bill of Rights.
>
> Cong. Rec. S11538 (August 5, 1995)

However, it is not clear how directly applicable this limitation on the use of results to evaluate Service employees was to be when compensating contractors. Thus, a reasonable interpretation of the legislative history supports the conclusion that the Service may enter into a contract that both requires protection of taxpayer rights afforded under TBOR and provides that a meaningful portion of contractor compensation will be based on revenue collected.

[redacted] DP

In addition certain other limitations to the typical contingency fee contract are required by provision of law apart from TAA96:

- The Antideficiency Act prohibits any agency from entering into an "obligation" in excess of available funding.[9] In order to avoid violation of the Antideficiency Act payments to contractors must be limited by a cap which insures that the cost of the private tax collection effort under TAA96 does not exceed the $13 million of available funding.

[redacted] LF

[9] Some agencies have received statutory authority to award contingent fee debt collection contracts. An example is the Department of Justice's private counsel debt collection pilot program, authorized by an amendment to 31 U.S.C. § 3718. But collection of federal taxes is specifically excepted from provisions of the law. 31 U.S.C. § 3718(d).

The Miscellaneous Receipts Act, as previously mentioned, prohibits the contractor from simply keeping a percentage of the amounts actually collected.

Additionally, types of contracts acceptable under the FAR and legally permissible under these acts could be used to accomplish the intentions reflected in the legislative history of TAA96. Either a fixed price-award fee contract or a fixed cost-plus-award fee incentive contract subject to a cap would be a viable alternative to a contract providing for traditional contingency payments. Under such a contract, payments to the contractor could increase with increased revenue collection and/or other criteria related to contract performance stipulated in the contract. We believe that this approach would be consistent with the goals discussed in the House Report, because criteria for incentive payments could be tied both to revenue collected and to contractor adherence to the principles of TBOR and the FDCPA.

VII. General Procurement Issues

1. Under procurement law is it permissible for one large vendor to subcontract all or portions of our contract to smaller vendors?

Generally, a contractor may subcontract for performing portions of the contracted work. But the contractor remains liable to the Government for the failure of its subcontractors to perform.

The Government may demand in the contract, in some circumstances, that subcontracts may not be entered into by the contractor except with the contracting officer's written consent. FAR Part 44 prescribes subcontracting policy and procedures. Consent to subcontract is required when the Government's interest is not adequately protected by competition and the type of prime contract or subcontract. FAR 44.102(a). A strong argument can be made here that the Government's interest in its initial program of private tax collection merits consent requirements.

VIII. Labor Issues

1. Does this override previously negotiated labor relations contracts?

As a law passed by Congress, P.L. 104-52 takes precedence over a negotiated contract. NORD IV, Article 2, Precedence of Law and Regulation, Section 1, provides that "[i]n the administration of all matters covered by the Agreement, the parties are governed by ... existing or future laws ... ."

[redacted] DI/A